NO. 42697-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

YAKIMA COUNTY DEPUTY SHERIFFS' LAW ENFORCEMENT GUILD,

Appellant,

v.

YAKIMA COUNTY and PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents,

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STATE OF WASHINGTON
BY
DEPUTY
FILED
COURT OF APPEALS
DIVISION II

APPELLANT YAKIMA COUNTY DEPUTY GUILD'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The County's brief ignores the essential defects in the Commission's decision — its failure to complete the required "balancing test" and its over-sweeping premise that labor organizations "do not need general membership or Board meetings to administer a collective-bargaining agreement."[1] The County's argument that the Commission's decision is entitled to deference because it is consistent with NLRB case law is wrong; the Commission's decision *significantly deviates* from that case law.

Common sense, as the Division I Court of Appeals has noted, requires *some* type of preparation for negotiations and common sense also indicates that labor organizations need *some* time to communicate with their members and among board members to effectively perform their work. But the question before the Court is actually far narrower. The question presented is not whether such "release time" rights are reasonable or what types of controls and restrictions should be placed on the use of such release time — the question presented is simply whether a union is allowed to make any such *proposal* and have it *discussed* in the collective bargaining process whatsoever. The County's position that the Guild proposal

[1] *See* CR 374 (PERC Decision at 12).

is beyond the scope of *any discussion* cannot be squared with a large body of case law and common sense.

II. LEGAL ARGUMENT

A. The County's Brief Ignores and Extends the Numerous Errors in the Commission Decision.

The County calls for "deference" to the PERC expertise." But the Guild respectfully suggests the error-riddled decision is entitled to no deference and deserves, instead, intensive scrutiny. Unfortunately, the perfunctory, and, frankly, sloppy analysis of the Commission creates bad precedent with real harm to the interests of state public sector labor organizations, especially those public safety units who must provide service on an around the clock basis.

The Guild respectfully submits that the abbreviated Commission decision failed to express a complete or coherent rationale. The shortcomings of the Commission decision are multiple: (1) A failed framing of the issue, (2) contradictions with existing case law — both persuasive NLRB case law *and its own presumably precedential case law*, (3) internal contradictions within the text, and (4) conclusions that in some cases, frankly, rise to the level of absurdities. The Guild does not intend to unduly

denigrate the overworked Commission,[2] but must call attention to errors that undermine the County's request that it be extended "deference."

The County's own brief, in summarizing the Commission action, demonstrates that Commission failed to properly *frame* the actual presented issue:

- As the County notes,[3] the decision states that "[t]he only question that we must now resolve is the legality of the union's proposals under Chapter 41.56 RCW"[4] — yet the proposals *are* legal (a point as discussed below that the County seemingly conflates and the Commission seemingly skips past) *and* the Commission finds a ULP committed even *no illegal proposals were presented*;

- As the County also notes,[5] the decision states that "employers are not required to train or subsidize the training of the represented employees on how to engage in collective bargaining"[6] — yet the issue presented concerns not what the employer would be "*required*" to do but rather what the Guild would be *allowed to propose*;

- In its decision, the Commission also states that "[i]t is the employer's prerogative to determine what kinds of training are necessary for employees to accomplish the employer's omission" — yet the issue presented

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[2] The current commission docket is nearly two years. http://www.perc.wa.gov/pendcommcase.asp. A review of older Commission decisions reveals that this is a change of circumstances. http://www.perc.wa.gov/search.asp in times past the Commission would normally generate a decision within only a few months of the appeal being filed.
[3] County brief at 3.
[4] CR 366 (Commission decision at 4).
[5] County brief at 4.
[6] CR 369 (Commission decision at 7).

concerns a proposal that would *not interfere with any training* the employer would want to provide but concerns the training *the Guild would want to make possible* for its officers and representatives;

- In its decision, the Commission states that "absent agreement with the employer, such training should be on the employees time" — yet the issue presented concerns whether the Guild can *make a proposal as the first step to reach such an agreement.*

The decision *contains contradictions and reflects confusion* on one of the key points — *the relationship between the Guild's release time proposal and contract administration*:

- On pages 10 and 11 of the decision, the Commission states that "paid release time for other union matters *not directly related to the administration of the agreement* between the employer and the bargaining representative are permissive in nature, and it is unfair labor practice to attempt to bargain those matters to impasse."[7]

This statement would imply that the release time *would be* bargainable *to the extent it directly related to contract administration.* No matter how logical this inference might be, other portions of the decision put that conclusion in doubt:

- On page 2 of its decision the commission concludes that "paid release time for general membership or Board meetings is a permissive subject of bargaining, *even if the reasons for those meetings are directly related to the administration of the collective bargaining agreement.*"[8]

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[7] CR at 372-73.
[8] CR 364.

- On page 7 of the decision, the Commission states that "[c]ontrary to the examiner's conclusion, release time for discretionary training does not equate to vacation leave, sick leave, or leave for military service because discretionary training, *whether it be for collective bargaining training that is related to the administration of the agreement or law enforcement*, in no way impacts wages, hours and working conditions."[9]

Ultimately, if the test is *not* the extent to which the proposed release time relates to contract negotiation and administration, then the Guild can in no way discern the test. Certainly, the case precedent would indicate that "nexus" question is the proper test.

As discussed in more detail below, the Guild finds simply unfathomable the Commission's stated conclusion that the topic of paid release time "*in no way* impacts wages, hours and working conditions."[10] In fact, *it involves all three.*

Another source of the overarching error in the Commission's decision is its failure consider case precedent of other labor boards. Contrary to its own past practice, the Commission indicated that on this occasion it was refusing to provide persuasive case authority from other jurisdictions "any weight."[11]

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[9] Commission decision at 369.
[10] *Id.* (emphasis supplied).
[11] CR 370 (Commission decision at 8).

The County acknowledges that in the past, contrary to its current refusal, PERC *has* considered and accorded NLRB authority persuasive weight.[12] As the State Supreme Court has acknowledged, there is value of such extra-jurisdictional authority:

> Washington's Public Employees' Collective Bargaining Act, RCW 41.56, is substantially similar to the National Labor Relations Act (NLRA), (Act of July 5, 1935, Pub. L. No. 74-198, 49 Stat. 449, as amended). For example, *compare* RCW 41.56.030(4) *with* 29 U.S.C. § 158(d) . *See generally* McClintock, Crump & Tuffley, *Washington's New Public Records Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 Gonz. L. Rev. 13, 60-67 (1975). *In construing state labor acts which appear to be based upon or are similar to the NLRA, decisions under that act, while not controlling, are persuasive.*[13]

As it overturned the Commission's decision in *IAFF, Local 1052 v Public Employment Relations Commission* the Supreme Court heavily relied upon the authority of other state labor boards.[14] There, as here, PERC failed to conduct a proper balancing analysis on a scope of bargaining case and there, as here, PERC reached a conclusion at odds with the bulk of labor law authority.

The Guild is unaware of a *single* previous PERC decision in which it has refused to consider decisions of other state labor

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[12] County Brief at 15.

[13] *Washington Federal of State Employees v. Board of Trustees*, 93 Wn.2d 60,67-68, 605 P.2d 636 (1980). (*Emphasis supplied)*

[14] *IAFF, Local 1052 v Public Employment Relations Commission*, 113 Wn.2d 197. The Court cited to *numerous* out of state decisions on a scope of bargaining: 113 Wn2d at 202, fn. 2 (citing Michigan state cases), at 203 (Citing to an entire ALR annotation on the scope of bargaining), at 204 (citing New Jersey cases) at 205 (citing multiple state cases), at 206 (citing Massachusetts case law) and at 207 (citing Pennsylvania and New York cases).

boards. It has *repeatedly* accorded some weight to out of state commissions in the past.[15] And in one of the passing peculiarities and contradictions of this Decision, *it actually cites to a portion of that case law dicta (perhaps unwittingly) in one section of its decision for a different purpose, while later refusing to even consider it on the issue before it.*[16] The Commission's otherwise refusal to even *consider* other relevant authority is inexplicable and warrants reversal.

B. The County's Brief Conflates Distinct Statutory Concepts.

The County reargues its initial "illegality" complaint which was rejected by the Hearing Examiner. Unfortunately, not only the County but also the Commission have lost sight of the presented

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[15] After a brief search, the Guild can identify *at least* 26 published decisions in which either the Commission or its Examiners cited decisions other state labor boards. *See* Commission Decisions: *University of Washington*, Decision 9410 (PSRA, 2006); *City of Pasco*, Decision 9181-A (PECB, 2008); *University of Washington*, Decision 8818-A (PSRA, 2006); *University of Washington*, Decision 8878-A (PSRA, 2006); *City of Auburn*, Decision 4880-A (PECB, 1995), *Spokane County Fire District No. 9*, Decision 3661-A (PECB, 1991), *Columbia School District* et. al., Decision 1189-A (PECB, 1982), *Grant County*, Decision 2233-A (PECB, 1986), *City of Seattle*, Decisions 4687-A and 4688-A (PECB, 1997), *Kent School District*, Decision 595-A (PECB, 1979) . *See also* Examiner decisions: *City of Tukwila*, Decision 1975 (PECB, 1984); *King County Fire District 16*, Decision 3714 (PECB, 1991); *Port of Pasco*, Decision 4021 (PECB, 1992); *King County Fire District 36*, Decision 11120 (PECB, 2011); *Kitsap County Fire District No. 7*, Decision 2872 (PECB, 1988); *Clover Park Technical College*, Decision 8534 (PECB, 2004); *Metro*, Decision 2986 (PECB, 1988); *Lower Snoqualmie Valley School District* (PECB, 1983); *City of Olympia*, Decision 3194, 1989); *Tacoma School District*, Decision 655 (EDUC, 1979); *King County Fire District No. 39*, Decision 2638 (PECB, 1987); *Castle Rock School District*, Decision 4722 and 4733 (EDUC, 1994); *City of Bellevue*, Decision 839 (PECB, 1980); *Metro*, Decision 4845 PECB, 1988); *Pierce County*, Decision 1710 (PECB, 1983); *Green River Community College*, Decision 4008-A (CCOL, 1993).

[16] *See* CR 367-69 (Commission Decision at 5-6) (noting that service decisions have been recognized "by the NLRB *and various state labor relations boards* as prerogatives of management." (Emphasis supplied.)

issue and have conflated distinct elements of the law. To put this issue into a clear focus, the Guild suggests a step back with a re-examination of *the explicit terms of the statute.*

Corresponding to the enumerated employer unfair labor practices defined in RCW 41.56. 140, RCW 41.56.150 identifies the elements of a union unfair labor practice:

> It shall be an unfair labor practice for a bargaining representative:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
> (2) To induce the public employer to commit an unfair labor practice;
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining.

While this ULP complaint concerns an employer-filed complaint under RCW 41.56.150, the parallel terms of RCW 41.56.140 are highly relevant:

> It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
> (2) To control, dominate, or interfere with a bargaining representative;
> (3) To discriminate against a public employee who has filed an unfair labor practice charge;
> (4) To refuse to engage in collective bargaining with the certified exclusive bargaining representative.

Both the County and PERC have conflated these provisions in a way that makes it nearly impossible to discern either what the County is actually arguing or what the Commission is actually concluding. A review of fundamental principles is necessary to re-establish the requisite clarity.

Both sections have a prong making it unlawful for parties to a collective bargaining relationship to "refuse to engage in collective bargaining." Either a public employer or a bargaining representative is deemed to have "refused" to engage in collective bargaining — under (4) of each applicable section — by insisting to impasse on a nonmandatory subject of bargaining.

What is mentioned but then is somewhat conflated in the County's analysis is that there are *three* classifications of bargaining proposals: "mandatory," "permissive," and "illegal." The last two — permissive and illegal subjects — are often clumped together under a common heading of "nonmandatory" subjects of bargaining. But while the proposal for *either* permissive or illegal subjects *might* form a basis of a ULP, they are, nonetheless distinct categories.

If a party insists on presenting a nonmandatory subject of bargaining to the point of impasse, a ULP has been committed whether the subject is "permissive" or "illegal" — nonmandatory

subjects of bargaining cannot be presented to the point of impasse. But permissive subjects *may* be presented at bargaining and *can be* discussed during negotiations – they need only be withdrawn if an "impasse" is reached. Illegal subjects, on the other hand, are never properly raised in bargaining and would subject the party to immediate ULP complaint, *whether or not impasse was ever reached.*

Here the County initially complained that the Guild's release time proposal was an *illegal* subject of bargaining. More specifically, the County alleged that the Guild violated RCW 41.56.150(2) by attempting "[t]o induce the public employer to commit an unfair labor practice." The ULP "induced", under this theory, was an employer violation of RCW 41.56.140(2) which makes it a ULP for an employer " [t]o control, dominate, or interfere with a bargaining representative."

The County attempts to buttress the Commission decision by arguing "illegality." And although the Commission's decision is not a model of clarity, it does *not* appear that the Commission adopted the County's subsection 2 theory. Nonetheless, because of a lack of clear expression and analysis by the Commission *and* its failure to engage in the required balancing analysis, *it is difficult if not*

impossible to discern how or why the Commission reached its conclusion.

The Guild acknowledges that *some* forms of employer support *might* violate RCW 41.56.140(2). Of relevance here, both the NLRB and PERC *have* determined that employer support for unions can --under some circumstances -- create a pathway for "controlling" and "dominating" labor organizations. American labor policy prohibits the creation of employer dominated unions because, it is presumed, that employer-dominated unions interfere with the ability of employees to have an effective voice.

By contrast, some nations, Japan, for example, allow committees in the workplace even though these, in essence, form employer dominated unions. While some argue that such "collaborative" relationships are beneficial, collaboration in this form is prohibited under the NLRA and the public sector collective bargaining laws of most states, including Washington.

So there is a policy premise underlying the principle that overreaching employer support is illegal as it might lead to improper control of the labor organization. The critical question becomes, then, *what type of support is unlawful support?*

The cases cited by the employer and discussed at pages 24 to 27 of their brief — the *City of Burlington*[17] and the *City of Pasco*[18] — involved release time lacking adequate boundaries and without a sufficient nexus to the contract negotiation and administration process. By contrast, here the Guild believed it had — and continues to believe that it had — by clarifying long standing language, framed a legitimate release time clause that would not allow the County to unduly "control" or "dominate" the Guild. And that issue is *the* central issue to be decided in this appeal.

The chief error by the Commission is that it seemingly conflated its case law under subsection 2 with that of subsection 4. And the County, by continuing to argue essentially under subsection 2 is actually confusing the issue and ironically undermining the viability of the decision.

The Commission never expressly finds that the Guild proposals violate subsection 2. This is, of course, because they do not violate subsection 2. But once the Commission apparently recognized that the release time language was not a violation of subsection 2, as the hearing examiner did, the complaint should have been dismissed. This is the crux of its error.

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[17] Decision 5840 (PECB, 1997).
[18] Decision 3582-A (PECB, 1991).

The Guild proposal that the Guild officers be permitted paid release time unequivocally relates to "wages," "hours," and "working conditions" — all of which are *expressly* identified in the statute as mandatory subjects of bargaining. It would be rare, indeed, for items directly relating to these terms to fall outside the scope of bargaining. The Commission's error — which the County seeks to perpetuate — is that it reached a conclusory and perfunctory decision in classifying the Guild proposal and did not engage in the requisite balancing of interests tests. That is the subject the Guild turns to next.

C. The County's Brief Ignores that PERC failed to engage in the Required "Scope of Bargaining" Balancing Test.

The County only *partially* identifies the PERC scope of bargaining standard. At page 11 of its brief, the County notes that the duty to bargain extends to "wages, hours, and working conditions." It also notes, which the Guild concedes, that "managerial decisions that only remotely affect 'personnel matters' and decisions that are predominantly 'managerial prerogatives,' are classified as non-mandatory subjects."

But what the County ignores is that the determination of whether a proposal is or is not subject to the duty to bargain is

required to be conducted through a "balancing test." The Commission noted the existence of the required balancing test,[19] *but never actually applied it.* Absent in the Commission's Decision is an evaluation of how directly paid leave time for collective bargaining duties affects the interests of employees. Because paid release time *directly* and literally affects "wages" (whether the employee is paid), "hours" (whether they are granted time off) and "working conditions" (the ability of the bargaining representative to effectively enforce the contract), a union argument that paid release time is negotiable is entitled to more than the conclusory rejection it was given.

The failure to engage in the balancing test is a *fatal* flaw in the Commission's decision. The County argues for "deference" to the Commission's analysis, *but deference is inappropriate when the analysis is incomplete.* The Commission is also not entitled to deference when it mostly ignored the binding Supreme Court precedent in *Graham v. Northshore School District.*[20]

The hearing examiner's decision should be reinstated; she properly noted and applied NLRA precedent. *Contrary to the claim*

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[19] Commission Decision at 7 (CR 369).
[20] 99 Wn.2d 232, 662 P.2d 38 (1983).

made by the County, decisions of the NLRB have found union inconsistently leave of the type proposed by the Guild to be within the mandatory scope of bargaining. Had the Commission *more carefully* considered this precedent and *properly applied its own balancing test*, it would have reached a similar conclusion.

D. Release Time for Contract Administration and Negotiations is not Unlawful and that does not change because some of the Time is Spent meeting with Employees.

The Commission's decision lacks clarity. The County's difficulty in defending the decision stems from that lack of clarity. As indicated, the Commission failed to balance the extent to which release time directly affects the employee's interest in bargaining "wages, hours and working conditions" against the interests of management. The County defends its position on release time on the grounds that the release time is "illegal," but the Commission never says that. Although the Commission cites *previous* PERC decisions finding broad union release time clauses to be unlawful, in this decision, it suggests that the Guild's proposal is a "permissive" (apparently not illegal) subject of bargaining.

As discussed above, this distinction is important. An illegal proposal cannot be presented at all. A proposal which is "permissive" may be presented at the table, but a party may refuse

to discuss it, *and* it is an unfair labor practice for one party to insist on a permissive subject to an impasse. A "mandatory" subject of bargaining, by contrast, can be discussed beyond the point of impasse, and both parties are obligated to engage in discussions to resolve proposals on mandatory subjects of bargaining.

The County accurately notes that the Public Employees Collective Bargaining Act is closely patterned after the NLRA. It also accurately notes that both statutes make it unlawful for an employer to "dominate or interfere" with the internal workings of a labor organization and that overbroad union release time clauses *can* be a form of such interference. What the County fails to acknowledge is that *NLRB cases consistently find the type of release time language proposed here to be within the mandatory scope of bargaining.*

With all due respect to the Commission, its analysis on this point is muddied, at best. It relies on its precedent finding overbroad clauses to be unlawful. But the Guild's proposal was specifically crafted to conform to that body of case law. PERC's apparent conclusion that the Guild's proposal, while not unlawful, is still a non-mandatory "permissive" subject of bargaining[21] is

[21] *See* Commission Decision at 10 (CR 372).

inexplicable. In short, PERC does not hold the Guild's proposal to be "illegal" but fails to explain why it is merely "permissive."

The NLRB cases cited in the County's brief do not support its claim that this Guild proposal elicits unlawful support. A consistent body of NLRA cases reveal that paid release time, provided it has *some* legitimate relationship to the collective bargaining process, is allowable and does not constitute unlawful support.

The County cites to the *Second Edition* of the seminal encyclopedia of NLRB case law — "The Developing Labor Law." The most recent *Fifth Edition* published *in 2006* did not have the quotation referenced in *the 1983* Second Edition, but, regardless, a review of that most recent edition would suggest that the County has apparently taken the discussion *entirely out of context.*

The *current* edition of "The Developing Labor Law" contrasts the employer failure to maintain neutrality during a contested *union election* by providing support to one of the competing unions with the extension of resources to the lawfully recognized bargaining unit:

> The Board and the courts thus evaluate the totality of an employer's conduct in determining whether the "natural tendency of [that] support would be to inhibit employees in their choice of a bargaining representative" and to restrict the employee group in maintaining an arm's-length relationship with the

employer. Accordingly, ***union use of company time and property does not establish a per se violation of Section 8 (a) (2) where the union is lawfully recognized.***[22]

Likewise, the NLRB cases cited in the County's Brief involve a misleading context. Both of the two NLRB cases cited by the employer involve employer attempts to dominate the union by *creating unlawful company sponsored unions.* By contrast, where there is a legitimate and certified bargaining representative, the NLRB has *repeatedly* found, in a variety of contexts, that the extension of some employer resources does not constitute unlawful assistance:

- In *Axelson, Inc.*,[23] the Board ruled that the payment of employer wages during contract negotiations constituted a mandatory subject of bargaining.

- In *Baker Mine Services Inc.*,[24] the Board not only allowed the paid release time for negotiations, as it had in *Axelson,* it further extended the scope of allowable support to include paying for union contract ratification ballots, employee time for ratification meetings and employee release time to participate in preparatory "committee meetings preceding negotiations."

- In *BASF Wyandotte Corporation,*[25] the Board found it an unfair labor practice to unilaterally revoke the four hours per day extended to union officers "to

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[22] Morris Developing Labor Law 456-458 (2006).
[23] 234 NLRB 414 (1978).
[24] 279 NLRB 609 (1986).
[25] 274 NLRB 978 (1985).

conduct union business, including grievance processing" rejecting an "unlawful support" argument by noting that the union "clearly is an independent entity with a well-established history of arm's-length dealings with BASF."

- In *Hesston Corporation,*[26] the Board found no unlawful assistance where the employer allowed employees paid time to participate in "biweekly meetings on the respondent's premises for the purpose of discussing items to be presented to management the next day" and allowed paid time for employees to participate in shop steward training classes.

The County's position — that allowing employees to attend union meetings on paid time is unlawful — can also not be squared with Washington court precedent, including *Northshore.*[27] The County's effort to distinguish these cases fails. The County attempts to distinguish *Shoreline Community College District Number 7 v. Employment Security Department*[28] declaring: "The Shoreline Community College case does not address release time in any fashion whatsoever."[29] The County apparently overlooked the pertinent text in which the court expressly classifies "*paid release time*" as a term and condition of unemployment under the Education Collective Bargaining Law[30], along with "salary,

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[26] 175 NLRB 96 (1969).
[27] *State Ex Rel. Graham v. Northshore School District*, 99 Wn.2d 232, 662 P.2d 38 (1983).
[28] 59 Wn.App. 65, 695 P.2d 1178 (1990).
[29] County brief at 32.
[30] RCW Chapter 28B.52

termination, probation and tenure procedures ... progressive discipline procedures, and equipment staffing decisions."[31]

The Commission action here cannot not be squared with PERC's recent decision in *City of Benton City*.[32] In *Benton City*, the employer committed unlawful discrimination when it ended an established practice of allowing membership meetings on paid time. *If release time for such meetings was unlawful support, it would not have made sense to have found the revocation of that privilege unlawful.* The Commission's decision also cannot be squared with *Seattle School District*[33] which specifically upheld a union's right to release time for meetings, *including Executive Board meetings.*

Simply put, the idea that no member meetings or Board meetings are ever needed to administer or negotiate a collective bargaining agreement *cannot be squared with real-life labor relations experience.* As the Court of Appeals indicated in *Ackley-Bell v. Seattle School District,*[34] separate meetings are an inherent part of the collective bargaining process.

A leading union representatives negotiations handbook — Maurice Better's "Contract Bargaining Handbook for Local Union

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[31] *59 Wn.App. at 71.*
[32] *City of Benton*, Decision 10956 (PECB, 2011).
[33] *Seattle School District*, Decision 2079 (PECB, 1984).
[34] 87 Wn.. App. 158, 940 P.2d 685 (1997).

Leaders" — recommends to unions a number of preparatory actions *that can only be taken outside face to face meetings with management*, including:

- Surveying Members
- Reviewing Contract Language
- Researching Financial and Budget Issues
- Conducting Wage and Compensation Surveys
- Communicating with Members

Likewise, a leading management handbook — Robert Cassel's "Negotiating a Labor Contract: A Management Perspective" recognizes this reality. He advises management that it should anticipate some "ground rule" discussion about pay for union negotiation committee members to include release time for "the committee's preparations for meetings."[35]

Furthermore, as discussed in Chapter 25 of "The Developing Labor Law," a union's "Duty of Fair Representation" *requires* a thorough and proper review of grievances through the union's *internal* vetting process.[36] *There is no conceivable way that this DFR process can be properly or lawfully concluded without holding internal Board meetings.* Washington courts have specifically noted that DFR responsibilities' *mandate* that unions

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[35] Cassel, NEGOTIATING A LABOR CONTRACT: A MANAGEMENT PERSPECTIVE 162 (2010).
[36] *Morris supra* at 1980-2093, especially 2041-52.

screen and investigate grievances to determine their merit and the thoroughness of the investigation required "depend[s] on the particular case."[37] *In the real world of labor relations, this Guild Board simply cannot fulfill its duties without meeting.*

Another Commission premise unanchored in reality is that some mysterious distinction exists between "Guild officers" and the Guild Board. There is *no distinction.* If the viability of the Commission Decision turns on this material point, then the summary judgment should be set aside and a record should be made on this erroneously *assumed* distinction. The Commission's claim that no "Board meetings" are necessary because "an exclusive bargaining representatives officers generally have sufficient authority to administer the agreement"[38] belies the fact that the Board *is made up of the officers* and they must talk at some point to effectively administer the agreement.

E. Paid Leave is a Mandatory Subject of Bargaining and that does not change because the Employees would use the Paid Leave for Training Purposes.

Both the Commission and the County misapprehend the nature of the training release time issue. The cases cited by both do

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[37] *Muir v. Council 2 Washington State Council of County and City Employees,* 154 Wn.App 528, 531-32, 225 P.3d 1024 (2009) (*quoting Castilli v. Douglas Aircraft Co.,* 752 F.2d 1480, 1483 (9th Cir. 1985).
[38] CR 374 (Decision at 12).

not relate to the Guild's proposal. Those cases involve whether an employer can unilaterally decide the content of its *employer-sponsored* training program. The issue in this case is *the opposite* – it concerns whether the union may bargain for paid leave for its employee representatives to attend *union sponsored* training.

The Guild is *not seeking* to interfere with the *employer's prerogative* to determine the content of whatever training the employer wishes to provide. The Guild *is seeking* to have *its right* recognized to obtain officer paid leave for necessary supplemental training — whether for collective bargaining purposes or other law enforcement purposes. As indicated in the referenced cases above, the NLRB clearly classifies union sponsored training as a mandatory subject of bargaining.[39]

The Guild proposal would also permit paid leave for supplemental law enforcement training. There are a myriad of situations where a law enforcement union would legitimately want working condition training:

- Officer Use of Force
- Officer Safety Concerns
- Officer Health and Wellness Issues

[39] *See* especially *Hesston Corp.*, 175 NLRB 96 (1969).

The narrow legal issue is not whether or not such training should actually be paid for. The legal issue is simply whether the union may legitimately *make a proposal* and bargain for whether some part of the training would be on paid time. The *scope and nature of such supplemental leave time should be left to the collective bargaining process.* PERC erred by applying a per se rule prohibiting the Guild from discussing the issue. This Court should instead adopt the reasoned approach of the NLRB and reinstate the hearing examiner's decision.

F. The County's Defense of the Overbroad Restraining Order Misses the Mark.

The County cites RAP 2.5, asserting that the Guild did not preserve its challenge to the PERC order. The County also defends the Superior Court order which incorporates the PERC language into its own separate order, arguing that this does not create an injunction. The County misses the mark. The Guild *did* properly raise the issue below. It challenged the PERC order throughout the proceeding and specifically discussed the scope of the order during oral argument.[40] Regardless, enforcement of the PERC order inherently involves a question of jurisdiction, an issue specifically exempted from RAP 2.5.

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[40] RP 4, 31-33

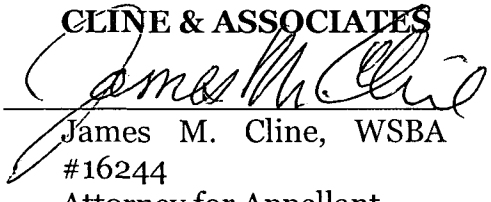
The County never justifies the overreaching nature of the PERC restraining order. When the Superior Court incorporated this same language into an order of its own, it did effectively (and incorrectly) issue an injunction against the Guild. That order was unwarranted both on procedural and substantive grounds and should be set aside.

III. CONCLUSION

For the foregoing reasons, the Examiner's Decision should be reinstated and the Commission's Decision (and Superior Court order enforcing it) should be overturned.

RESPECTFULLY SUBMITTED this 27th day of April, 2012, at Seattle, Washington.

CLINE & ASSOCIATES



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Yakima County Deputy Sheriffs Law Enforcement Guild

CERTIFICATE OF SERVICE

I, Annie McMahon, Legal Assistant at Cline & Associates, declare under penalty of perjury of the laws of the State of Washington that the following is true and correct:

On the below date, I served the foregoing **Appellant's Reply Brief** and this Certificate of Service in the foregoing referenced matter in the following manner to the entities below listed.

COURT OF APPEALS
DIVISION II
12 APR 30 AM 9:22
STATE OF WASHINGTON
BY
DEPUTY

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Dated this 27th day of April, 2012 at Seattle, Washington.

Annie McMahon